SBC Communications Inc.
1401 I Street, N.W.
Suite 1100
Washington, DC 20005

April 28, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton

Re: CC Docket No. 97-90/CCB/CPD 97-12, Requests of US West Communications, Inc. For Interconnection Cost Adjustment Mechanisms

On behalf of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, please find enclosed an original and 6 copies of their "Reply Comments" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Alan F. Ciamporcero

Alan F. Ciamporcero
Vice President
Federal Regulatory Relations
Pacific Telesis Group
(A Subsidiary of SBC Communications, Inc.)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Requests of US West Communications, Inc. For Interconnection Cost Adjustment Mechanisms	CC Docket No. 97-90 CCB/CPD 97-12

REPLY COMMENTS OF
SOUTHWESTERN BELL TELEPHONE COMPANY,
PACIFIC BELL AND NEVADA BELL

Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell ("SBC Telephone Companies") hereby submit their Reply to the comments filed in the above-captioned proceeding.

Replete as they are with the usual complaints about the "exorbitant" cost of entering the local exchange business, none of the comments filed by Competitive Local Exchange Carriers ("CLECs") or Interexchange Carriers ("IXCs") in this proceeding demonstrate why the Commission should grant the Petition[1] and attempt to micromanage State proceedings across the country to set the terms and conditions of local exchange entry.

[1] Petition for Declaratory Ruling and Contingent Petition for Preemption of Electric Lightwave, Inc., McLEODUSA Telecommunications Services, Inc., and NEXTLINK Communications, L.L.C., filed February 20, 1997 ("Petition").

I. Interconnection Charges Determined In Accordance with Section 252 of the Act Are Not Unlawful Under Section 253.

The tacit premise of the Petition is that terms and conditions of interconnection that are determined by States in accordance with Section 252 of the Act may constitute an unlawful barrier to entry under Section 253. *See* Petition, p. 10. CLECs are almost unanimous in supporting this position, which (otherwise stated) is that Section 253 overrides Section 252. *See* ACS, p. 6; GST, pp. 3-6; Aliant Communications Co. ("Aliant"), p. 2; MCI, p. 4; ICG Telecom Group ("ICG"), p. 7. None of the CLECs, however, attempts to overcome the obvious problem that their position creates a gaping contradiction in the statute. As the Eighth Circuit recognized when it granted an interim stay of the pricing and pick-and-choose rules adopted in Docket 96-98, the terms and conditions of interconnection are uniquely suitable for the States to determine and were, in fact, specifically entrusted to the States by Section 252 of the Act if negotiating parties cannot voluntarily agree on terms. The jurisdictional enclaves that Section 252 carefully defines for privately negotiating parties, State commissions, the FCC, and federal courts would be a mockery if the FCC could use Section 253 to short-circuit the Section 252 process and impose its will on all other parties.

The Eighth Circuit was presented with this argument and refused to accept it. Following an oral argument in which counsel for the Commission explicitly relied on Section 253, as well as Sections 251-52, for the proposition that the FCC could dictate the terms and conditions of interconnection to the States, and complained that State-determined prices might become barriers to entry, the Eighth Circuit declared itself to be satisfied (at least until judgment on the merits) that, in

any event, "*under the Act*, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service."[2]

The Petition does not just invite the Commission to flout the Eighth Circuit, however. It invites it to flout the statute as well. The notion that Section 253 takes away any of the States' authority under Section 252 to determine the terms and conditions of interconnection if negotiating parties cannot agree on them, as Petitioners and some CLECs (*see, e.g.*, CompTel, pp. 7-8) suggest, would violate one of the oldest principles of statutory construction: that a statute not be interpreted to be internally inconsistent.[3] Even if there were any such conflict between Sections 253 and 252, then under equally hallowed canons of statutory construction, the specific provisions of Section 252 would "trump" any general power to preempt that Section 253 confers on the FCC, not vice-versa.[4]

II. Contrary to the Petition, CLECs Themselves Widely Concede That All Interconnection Costs May Be Recovered in Interconnection Charges.

The first and central premise of the Petition is that the costs intended to be recovered by U S West's ICAM charges are not recoverable from CLECs pursuant to Section 252(d) of the Act, but instead must be recovered as part of U S West's overall rate base, if at all. Petition, pp. 5, 10. In our Comments, we pointed out the reasons that costs attributable to interconnection should be recovered

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[2] *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir., October 15, 1996), Order Granting Stay Pending Judicial Review, pp. 15-16 ("Order Granting Stay") (emphasis added).

The Commission also relied on Section 253 in its briefs. If the judgment on the merits goes against the Commission, the Petition will be mooted and should be denied.

[3] *See Washington Market Co. v. Hoffman*, 101 U.S. 112 (1879).

[4] *See Rodgers v. United States*, 185 U.S. 83, 87-88 (1902). Section 252 does specifically provide that in one instance Section 253 governs: "subject to Section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement." 47 U.S.C. Section 252(e)(3). This specific cross-reference proves that in all other cases Section 252 governs.

from interconnecting parties; we will not repeat them here. Significantly, however, a number of CLECs themselves do not find the Petition's central premise to be a tenable one. For example, American Communications Services ("ACS") says U S West's ICAM charges "either already are accounted for -- or should be accounted for" in interconnection rates (ACS, p. 3). The Association for Local Telecommunications Services ("ALTS") says:

> U S West is seeking authority from its state commissions to recover the so-called "start up" costs of serving CLECs [in ICAM charges] ... But Sections 251 and 252 indicate that CLECs should pay for any costs they impose in their interconnection agreements (as U S West has emphasized to both the Commission and the Eighth Circuit), and neither section excludes start up costs. Accordingly, start-up costs ... are fully accommodated within the comprehensive forward looking cost principles which the Commission, and most states, have adopted to determine the proper prices for interconnection agreements under Sections 251 and 252. (ALTS, pp. 1-2.)

WorldCom, Inc. ("WorldCom") agrees:

> Section 252 describes in considerable detail the procedures to be followed to establish [interconnection] agreements. First, they may be arrived at through voluntary negotiations, mediation or arbitration. Second, they must incorporate certain costing standards. And, third, they must be approved by the appropriate state regulatory commission. The process is very clear -- U S West has the opportunity both to identify and to negotiate recovery of any of its costs for interconnection related network rearrangements that were undertaken for the convenience and use by USWC's competitors....
>
> So, U S West's assertion that it has no way to recover these costs simply is not true. Whether the rates that ultimately are established are sufficient is a matter left under the Act to negotiation and state review. (WorldCom, p. 4.)

Teleport Communications Group, Inc. ("TCG") echoes this as well:

> [T]hrough the arbitration process, and through subsequent state proceedings to establish permanent cost-based interconnection rates, U S West can recover its costs that are attributable to interconnection, the provision of unbundled network elements and resale services to competitors, and transport and termination. (TCG, p. 7.)

While purporting to support the Petition, these CLECs clearly undercut it. The very first argument in the Petition is entitled: "Costs Associated With U S West's Network Rearrangements Are Not Recoverable Costs Pursuant to Section 252(d) of the Communications Act." (Petition, p. 5.) All of the other arguments in the Petition follow from this first one. If -- as we have contended, and as we believe the Commission has already held in Docket 96-98 -- interconnection costs such as those recovered by U S West's ICAM charges are, in fact, recoverable from interconnecting CLECs under Section 252, the Petition should be summarily denied.

III. Interconnection Charges Are Not Subject to the "Competitive Neutrality" Test for Numbering Administration Arrangements and Number Portability.

A number of CLECs contend that U S West's proposed ICAM charges should be preempted because they are not competitively neutral according to the criteria adopted in the Commission's Telephone Number Portability docket. (*See, e.g.,* AT&T, pp. 11-13; Sprint, p. 8; ICG, pp. 6-10.) The argument is a red herring. Section 253, of course, has no "competitive neutrality" test in it. The "competitive neutrality" test of Section 251(e)(2) by its terms applies only to numbering administration and number portability. It is an exception to the "pro-competitive, de-regulatory" purposes of the 1996 amendments.[5] It is also an exception to the principles of cost-causation, already long espoused by the Commission,[6] that are at the heart of Section 252. As ALTS says:

> Nothing in Sections 251 or 252 suggests that the prices imposed by interconnection agreements -- whether negotiated or arbitrated -- are not subject to cost causation principles. On the contrary, the hundreds of pages devoted to pricing rules in the Local Competition Order ... amply demonstrate the Commission's concern that cost recovery for interconnection should reflect cost-causation. (ALTS, p. 4.)

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[5] *See* 104th Cong., 2d Sess., H.R. Report 104-458, p. 1.

[6] *See Telephone Number Portability*, 11 FCC Rcd 8352, para. 131 (1996).

It may be "competitively neutral," but it is not "pro-competitive" when regulation seeks to ensure that no "one service provider [has] an appreciable, incremental cost advantage over another service provider."[7] On the contrary, incremental cost advantages are what promote lower consumer prices and make competition work.

Section 252 says unambiguously that prices of interconnection and network elements "shall be based on the cost" of providing them (and "may include a reasonable profit").[8] If that cost may, as AT&T and some other CLECs claim, "have the effect of prohibiting some potential entrants from offering competing telecommunications services" (AT&T, p. 7), that effect is the result of an explicit requirement of the Act, and is consistent with what happens in competitive markets every day.

IV. The Determination of Local Charges by State Commissions Does Not Violate the Act.

The Competitive Telecommunications Association ("CompTel") suggests that if interconnection charges set by State commissions recover costs of "facilities [that] will be used not only to route local traffic from interconnecting local carriers, but to route interstate access traffic for long distance carriers pursuant to Part 69 of the Commission's rules," it would violate Section 2(b) and the Commission is thereby provided "with an alternative ground for preempting any state action approving or authorizing the ICAM surcharge proposed by U S West." (CompTel, p. 11.) There are three problems with this "alternative ground." First, it is inconsistent with the position taken by the FCC. Second, it is inconsistent with the position taken by the Eighth Circuit. And third, combined with CompTel's previous arguments to the Commission and the Eighth Circuit that access charges can

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[7] *See id.*, para. 132.

[8] 47 U.S.C. Section 252(d)(1).

be avoided by making "requests for interconnection" under Section 251, it leads ineluctably to the absurd position that carriers are legally entitled to pay nothing at all.

The Commission's reasoning in Docket 96-98 is that the 1996 Act created a system of "parallel jurisdiction" to replace the 1934 Act's system of "dual regulatory jurisdiction."[9] "We also hold that the regulations the Commission establishes pursuant to Section 251 are binding upon the states and carriers and Section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to Section 251. Similarly, we find that the states' authority pursuant to Section 252 also extends to both interstate and intrastate matters."[10] If this view prevails, it obviously moots the "alternative ground" suggested by CompTel. In the meantime, the FCC and CLECs cannot have it both ways by granting the Petition on an "alternative ground" that contradicts the FCC's own jurisdictional theory.

Second, the "alternative ground" would be inconsistent with the Eighth Circuit's view of the States' jurisdiction. The Eighth Circuit was of the opinion that the provision of interconnection, network elements, and wholesale services is "essentially local service" and that "[h]istorically, the state commissions have determined the rates" for it.[11] Section 252 of the 1996 Act amended the traditional division of powers not by conferring new authority on the FCC to step in where the States once ruled, but by conferring the "jurisdiction" to set prices for interconnection first on freely negotiating private parties, then if negotiations broke down on state commissions (due to their historical expertise and

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[9] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, FCC 96-325, released August 8, 1996, paras. 83, 85.

[10] *Id.*, para. 84.

[11] Order Granting Stay, p. 13.

jurisdiction over other local rates), and only if all else fails on the FCC or on a federal court (neither of which has such historical expertise).

Finally, the "alternative ground" makes a ridiculous complement to the position, which CompTel and other IXCs have strenuously argued elsewhere, that any carrier may request interconnection, network elements, and resold local exchange service for the sole purpose of providing (to itself or others) interexchange access with no restrictions and without paying access charges (whether state or interstate).[12] We have responded to this argument elsewhere, among other things pointing out the statute's explicit recognition that both state[13] and interstate[14] access charges would continue to apply to access services. CompTel's "alternative ground" is the other shoe dropping. If the States "lack jurisdiction to adopt any mechanism to recover the costs associated with" local exchange facilities, merely because those facilities may also be used for interstate access, as CompTel now says; and if carriers who use those facilities for access cannot be required to pay access charges, because Sections 251-52 now require such access to be cost-based, as CompTel has previously said; then the sum total of CompTel's position would certainly seem to be that no one has the authority anymore to make CompTel pay for anything. Consistent as this may be with the view that any entry cost at all is an unlawful barrier to entry, it makes a mockery of a statute that is based on principles of cost recovery.

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[12] *See*, for example, Brief of Petitioner Competitive Telecommunications Association, Iowa Utilities Board v. FCC, No. 96-3321 et seq., Nov. 18, 1996, pp. 11 et seq.

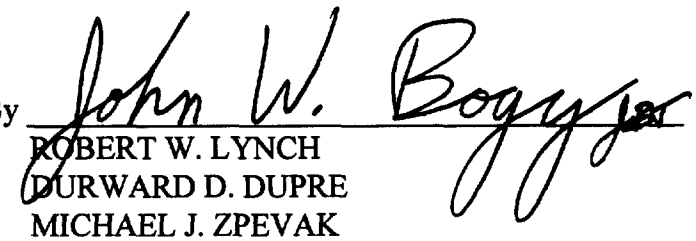
[13] *See* 47 U.S.C. Section 251(d)(3).

[14] *See* 47 U.S.C. Section 251(g).

For these reasons, we urge the Commission to deny the Petition.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY
PACIFIC BELL
NEVADA BELL

By 
ROBERT W. LYNCH
DURWARD D. DUPRE
MICHAEL J. ZPEVAK

Attorneys for
Southwestern Bell Telephone Company

One Bell Center, Suite 3518
St. Louis, Missouri 63101
(314) 235-4300

RANDALL E. CAPE
JOHN W. BOGY

Attorneys for Pacific Bell and Nevada Bell

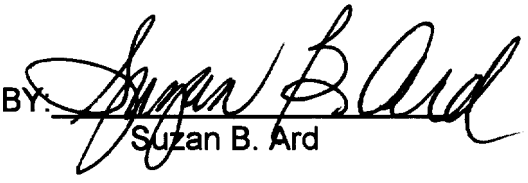
140 New Montgomery Street
San Francisco, California 94105
(415) 542-7634

Their Attorneys

Date: April 28, 1997

CERTIFICATE OF SERVICE

I, Suzan B. Ard, hereby certify that copies of the foregoing "**REPLY COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL AND NEVADA BELL**" regarding file No. CCB/CPD 97-12 were served by hand or by first-class United States Mail, postage prepaid, upon the parties appearing on the attached service list this 28th day of April, 1997.

BY: 
Suzan B. Ard

PACIFIC BELL
140 New Montgomery Street
San Francisco, CA 94105

SERVICE LIST - CC DOCKET 97-90 AND CCB/CPD 9712

James D. Schlichting, Chief *
Competitive Pricing Division
FEDERAL COMMUNICATIONS COMMISSION
1919 M Street, N. W.
Room 518
Washington, D. C. 20554

International Transcription *
Services, Inc. (ITS)
2100 M Street, N. W.
Suite 140
Washington, D. C. 20037

Robert B. McKenna
Attorney for
U. S. WEST, INC.
1020 19th Street, N. W.
Suite 700
Washington, D. C. 20036

Richard J. Metzger
General Counsel
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES
1200 19th Street, N. W.
Suite 560
Washington, D. C.

R. Michael Senkowski
Robert J. Butler
Suzanne Yelen
WILEY, REIN & FIELDING
Attorneys for
GTE SERVICE CORPORATION
1776 K Street, N. W.
Washington, D. C. 20006

Gail L. Polivy
GTE SERVICE CORPORATION
1850 M Street, N. W.
Suite 1200
Washington, D. C. 20036

Douglas G. Bonner
Mark Sievers
SWINDLER & BERLIN, CHARTERED
Attorneys for
GST TELECOM, INC.
3000 K Street, N. W.
Suite 300
Washington, D. C. 20007

Peter Arth, Jr.
Lionel B. Wilson
Mary Mack Adu
Attorneys for the People of the
State of California and the Public
Utilities Commission of the State
of California
505 Van Ness Avenue
San Francisco, CA 94102

Robert J. Aamoth
KELLEY DRYE & WARREN LLP
Attorneys for the COMPETITIVE
TELECOMMUNICATIONS
ASSOCIATION
1200 19th Street, N. W.
Suite 500
Washington, D. C. 20036

Genevieve Morelli
Executive Vice President
and General Counsel
COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
1900 M Street, N. W.
Suite 800
Washington, D. C. 20036

Lawrence W. Katz
Attorney for the
BELL ATLANTIC
TELEPHONE COMPANIES
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

William J. Balcerski
Attorney for the
NYNEX TELEPHONE COMPANIES
1095 Avenue of the Americas
New York, New York 10036

* BY HAND

Teresa Marrero
Senior Regulatory Counsel - Federal
TELEPORT COMMUNICATIONS
GROUP, INC.
Two Teleport Drive
Staten Island, N.Y. 10311

Leon M. Kestenbaum
Jay C. Keithley
Norina T. Moy
SPRINT CORPORATION
1850 M Street, N. W.
Suite 1110
Washington, D. C. 20036

Albert H. Kramer
Jacob S. Farber
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
Attorneys for
ICG TELECOM GROUP, INC.
2101 L Street, N. W.
Washington, D. C. 20037-1526

Cindy Z. Schonhaut
Senior Vice President
Julia Waysdorf
Senior Director
Goverment Affairs
ICG TELECOM GROUP, INC.
9605 East Maroon Circle
Englewood, CO 80112

Mark C. Rosenblum
Roy E. Hoffinger
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920

David W. Carpenter
David L. Lawson
SIDLEY & AUSTIN
AT&T CORP.
One First National Plaza
Chicago, Illinois 60603

David N. Porter
Vice President - Government Affairs
WORLDCOM, INC.
1120 Connecticut Avenue, N. W.
Suite 400
Washington, D. C.

Roy C. Lathrop
Amy G. Zirkle
Lisa B. Smith
MCI TELECOMMUNICATIONS
1801 Pennsylvania Ave., N. W.
Washington, D. C. 20006

Robert A. Mazer
Albert Shuldiner
VINSON & ELKINS, L.L.P.
Counsel for
ALIANT COMMUNICATIONS CO.
1455 Pennsylvania Ave., N. W.
Washington, D. C. 20004-1008

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS
LAW GROUP
Attorneys for
TELECOMMUNICATIONS
RESELLERS ASSOCIATION
1620 I Street, N. W.
Suite 701
Washington, D. C. 20006

Brad E. Mutschelknaus
Danny E. Adams
John J. Heitmann
KELLEY DRYE & WARREN LLP
Attorneys for
AMERICAN COMMUNICATIONS
SERVICES, INC.
1200 19th Street
Suite 500
Washington, D. C. 20036

Riley M. Murphy
Charles H.N. Kallenbach
James C. Falvey
AMERICAN COMMUNICATIONS
SERVICES, INC.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Laura H. Phillips
Christopher D. Libertelli
DOW, LOHNES & ALBERTSON, PLLC
Attorneys for
COX COMMUNICATIONS, INC.
1200 New Hampshire Avenue, N. W.
Suite 800
Washington, D. C. 20036

Casey D. Mahon
Senior Vice President and
General Counsel
Counsel for McLEODUSA
TELECOMMUNICATIONS
SERVICES, INC.
221 3rd Avenue, S. E.
Suite 500
Cedar Rapids, Iowa 52401

J. Scott Bonney
Vice-President - Regulatory and
External Affairs
NEXTLINK COMMUNICATIONS, L.L.C.
155 108th Avenue, N. E.
8th Floor
Bellevue, Washington 98004

Mitchell F. Brecher
Robert E. Stup, Jr.
FLEISCHMAN AND WALSH, L.L.P.
Counsel for
ELECTRIC LIGHTWAVE, INC.
1400 Sixteenth Street, N. W.
Suite 600
Washington, D. C. 20036

Daniel M. Waggoner
Richard L. Cys
DAVIS WRIGHT TREMAINE, L.L.P.
Counsel for
NEXTLINK COMMUNICATIONS, L.L.C.
1155 Connecticut Avenue, N. W.
Suite 700
Washington, D. C. 20036